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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1022

PAUL LUCERO, a minor child,

Petitioner,

v.

ROOSEVELT IRRIGATION DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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Judicially established blanket immunity granted to canal and irrigation system owners from tort liability constitutes an unreasonable, arbitrary and capricious denial of petitioner's right to recover damages resulting from respondent's negligence, and has no real and substantial relation to the object sought to be attained, i.e., the preservation of a canal and irrigation system which is indispensable to the maintenance of life and property in the State of Arizona.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

PAUL LUCERO, a minor child,

Petitioner,

v.

ROOSEVELT IRRIGATION DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The petitioner PAUL LUCERO respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona entered in this proceeding on November 19, 1974.

OPINION BELOW

The memorandum decision of the Court of Appeals, State of Arizona, affirming the trial court's order granting summary judgment, and the order of the Supreme Court of the State of Arizona, denying acceptance of the Petition for Review of the memorandum decision of the Court of Appeals, both of which are unreported, appear in the appendix hereto.

JURISDICTION

The order of the Supreme Court of the State of Arizona denying acceptance of the petition for review of the memorandum decision of the Court of Appeals, State of Arizona, was entered on November 19, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction

is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does the judicially created special immunity from tort liability which has been granted to canal and irrigation system owners in the State of Arizona, and to no one else, violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution by precluding recovery for personal injuries sustained resulting from the negligence of a canal or irrigation system owner.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, amendment XIV, §1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARIZONA CONSTITUTION, art. 2, §13:

"Section 13. No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

STATEMENT OF THE CASE

On August 7, 1969, petitioner, who was 13 years old at the time, and his companion, crawled through a concrete pipe that led into a diversion box, or turnout box, that was owned and operated by respondent and located within the City of Phoenix, State of Arizona.

The diversion box, which serves the purpose of changing the direction of the flow of water within an irrigation system, was constructed of concrete and was approximately 4 feet wide and 105 inches deep. There was a ladder permanently affixed to the inside wall of the diversion box and the top was covered with a metal plate which had been welded to the box.

There were two pipes entering the box, one from the upstream side and one from the downstream side, the latter of which is the pipe through which petitioner and his companion entered the diversion box. The pipe entering the diversion box from the upstream side, through which the flow of water entered the box, was an underground pipe approximately 2500 feet in length. The pipe entering the diversion box from the

downstream side which was 30 inches in diameter carried water from the box into an open irrigation ditch, otherwise referred to as an open lateral.

There was no grate, or protective device of any kind, preventing entry into the concrete pipe through which the petitioner and his companion entered into the diversion box. The reason given for the failure to grate or screen the downstream pipe was that there would be no way to remove any trash or debris that could accumulate behind such a protective device. The validity of this assertion is strenuously disputed by petitioner and constitutes one of the issues of fact which was never presented to the trial court in view of its order granting summary judgment as a matter of law.

No permanent warning device was

ever affixed to the diversion box. Paper warning signs had been previously posted on the diversion box but those were destroyed almost as soon as they were placed on the box.

Respondent's superintendent was aware that children played in respondent's canals and in the specific canal near the subject diverison box.

After gaining entry to the diversion box through the unscreened downstream pipe, petitioner and his companion were trapped inside when, because of the increasing water pressure that was caused by the filling of the diversion box with water, they were unable to remove boards which had been placed against the opening of the downstream pipe from inside the diversion box.

When the diversion box became filled with water with the boys trapped

inside, petitioner suffered severe and irreparable brain damage and his companion suffered death. Petitioner was removed from the diversion box 25 minutes after he became trapped inside by firemen who were called to the scene and who were able to cut an opening in the metal top by use of an acetylyne torch.

As a result of the above circumstances, petitioner filed his complaint against respondent on October 7, 1970, alleging that the petitioner's injuries were proximately caused by the respondent's negligence. Respondent's answer, which was filed on December 1, 1970, alleged that respondent had no duty of any kind to plaintiff [petitioner] under the then existing circumstances.

On February 16, 1971, respondent

filed a Motion for Summary Judgment which was opposed by petitioner and denied by the trial court on April 1, 1971.

On September 13, 1971, respondent filed a Supplemental Motion for Summary Judgment which was also opposed by petitioner but which was granted by the trial court on October 7, 1971.

On October 15, 1971, a formal judgment granting respondent's Supplemental Motion for Summary Judgment was entered by the trial court wherein it was provided that:

> "The court finds that there is no genuine issue as to any material fact relating to the liability of the defendant and that it is, therefore, entitled to judgment as a matter of law."

A Notice of Appeal from the trial court's judgment was filed on

December 14, 1971, and on August 1, 1974, the Court of Appeals issued its memorandum decision affirming the trial court's judgment.

The Motion for Rehearing filed by petitioner was denied by the Court of Appeals and a Petition for Review was subsequently filed with the Supreme Court of the State of Arizona.

On November 19, 1974, the Supreme Court of the State of Arizona entered its order denying petitioner's Petition for Review, with two of the five justices voting to grant the petition.

Constitutional arguments based upon section 1 of the Fourteenth Amendment to the United States Constitution were initially raised by petitioner, before the trial court, in response to respondent's Supplemental Motion for Summary Judgment

and were again raised as assignments of error in the case on appeal. Neither the trial court, in its judgment, nor the appellate courts, in their opinions, discussed the constitutional issues raised by petitioner with regard to the petitioner's allegation that he was being denied equal protection of the law.

REASON FOR GRANTING THE WRIT

JUDICIALLY ESTABLISHED BLANKET IMMUNITY GRANTED TO CANAL AND IRRIGATION SYSTEM OWNERS FROM TORT LIABILITY CONSTITUTES AN UNREASONABLE, ARBITRARY AND CAPRICIOUS DENIAL OF PETITIONER'S RIGHT TO RECOVER DAMAGES RESULTING FROM RESPONDENT'S NEGLIGENCE, AND HAS NO REAL AND SUBSTANTIAL RELATION TO THE OBJECT SOUGHT TO BE ATTAINED, I.E., THE PRESERVATION OF A CANAL AND IRRIGATION SYSTEM WHICH IS INDISPENSABLE TO THE MAINTENANCE OF LIFE AND PROSPERITY IN THE STATE OF ARIZONA.

In the case of Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 P.441 (1909), the Supreme Court of the State of Arizona was confronted with the question as to whether the facts in

Salladay brought that case within the decision of the so-called "Turntable Case", i.e., Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873). Simply stated, the Arizona Supreme Court was asked in Salladay to determine whether to apply the attractive nuisance doctrine to canals.

As noted in Salladay:

> "The so-called 'turntable decision', as announced in the Stout case, is to the effect that where a child, so young as not to realize the danger, and a technical trespasser, is injured while playing upon a turntable upon the railroad company's premises, which the railroad company, knowing its attraction to children, has negligently left unlocked, the company is liable in damages for such injuries, where by reasonable care the danger might have been obviated." Id. at 128, 100 P. at 442.

In considering the question of liability in conjunction with the particular facts of its case, i.e., an action to recover damages for the wrongful

death of an infant of the age of three years which resulted when such infant fell into an open flume maintained by the defendant, on the defendant's property, and was swept to her death by the force of the water being borne by the flume, the Arizona Supreme Court held that such facts did not present a case that was covered by the "Turntable" decision. The court reasoned:

> "Not only flumes, but irrigation ditches, large and small, similar in purpose, construction and use, and equally dangerous and alluring to the child, are to be found throughout the territory wherever cultivation of the land is carried on, and such conduits, practically impossible to render harmless, are indispensable for the maintenance of life and prosperity. There is no distinction that can properly be drawn for liability for injuries received by a child from any of such various means of diversion or use of water. Both as a matter of law and as a matter of public policy we feel that the so-called "turntable" doctrine should not be extended to cover such a case as is here

presented." Id. at 129-30, 100 P.442. (Emphasis original).

In subsequent decisions, the Arizona Supreme Court has:

> ". . .built upon and extended the Salladay decision to provide almost complete immunity to irrigation districts in Arizona in the maintenance not only of the canals and diversion points, but also various mechanical and electrical equipment needed to operate the water distribution system." Dombrowski v. Maricopa Co. Mun. Wat. Cons. Dist., 108 Ariz. 275, 276, 496 P.2d 136, 137 (1972).

Simply stated, no Arizona court, since Salladay, regardless of the factual circumstances presented, has failed to grant summary judgment against the plaintiff in a cause of action for personal injuries resulting from the negligent maintenance, construction or operation of canals, diversion points or any of the various mechanical and electrical equipment needed to operate the water distribution system which allegedly

constituted an attractive nuisance. Lee v. Salt River Valley Water User's Ass'n, 73 Ariz. 122, 238 P.2d 945 (1951); City of Glendale v. Sutter, 54 Ariz. 326, 95 P.2d 569 (1939); Elkins v. Roosevelt Water Conservation District, 22 Ariz. App. 130, 524 P.2d 964 (1974); Rodriquez v. Salt River Valley Water Users Ass'n, 19 Ariz. App. 223, 506 P.2d 263 (1973); Hersey v. Salt River Valley Water Users Ass'n, 10 Ariz. App. 321, 458 P.2d 525 (1969).

Petitioner submits that the blanket immunity granted to irrigation districts by Salladay, and its progeny, is unreasonable, arbitrary and capricious when applied to the facts and circumstances of the instant case.

As was stated by the Arizona Supreme Court in Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963), wherein such court swept

away the doctrine of governmental immunity for negligent conduct:

> " There is perhaps no doctrine more firmly established than the principle that, liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception." Id. at 392, 381 P.2d at 112.

In Stone, the Arizona Supreme Court was asked to affirm a rule, and refused to do so, that denied recovery to one injured by reason of the negligent maintenance of the highway by certain state officials, even though recovery could be had by one injured in a city which had failed to properly maintain its own streets.

However, in the instant case, the Arizona Supreme Court refused, by denying acceptance of petitioner's Petition for Review, to strike down a

rule that denies recovery to one injured by negligent construction, maintenance or operation of an attractive nuisance by the owner of an irrigation system, when liability is clearly recognized for the construction, maintenance or operation of an attractive nuisance by any party or person other than an irrigation system owner.

No other entity which provides services necessary to the maintenance of life and prosperity in Arizona such as electricity, natural gas, and telephone service or constructs and maintains intra-state highways, including the State of Arizona itself, is immune from liability resulting from the negligent maintenance of an attractive nuisance.

Furthermore, the immunity granted to irrigation system owners extends only to liability arising from the negligent construction, maintenance or operation

of the irrigation system itself and does not extend to those other functions necessarily attendant to such irrigation system which do not constitute an integral part thereof, such as the operation of motor vehicles and the maintenance of properties other than the irrigation system itself, owned or occupied by an irrigation system.

In light of present geographic, economic and social conditions existing in the Phoenix metropolitan community, the preservation of a judically created blanket immunity from tort liability for one privileged class, i.e., irrigation system owners, is unjustifable, unreasonable, arbitrary and capricious and, therefore, denies petitioner equal protection of the law.

In addition to the foregoing, such blanket immunity has no real and substantial relation to the object sought

to be attained which is the preservation of a canal and irrigation system which, admittedly, is indispensable to the maintenance of life and prosperity in the State of Arizona.

It must be noted that petitioner does not dispute the validity of the argument advanced in support of Salladay to the effect that preservation of a canal and irrigation system is indispensable to the maintenance of life and prosperity in the State of Arizona. However, petitioner strenuously disputes that the preservation of a canal and irrigation system requires the application of a judically created blanket immunity from tort liability to the owners of such systems.

It is not, as was the case with the flume in Salladay, ". . .practically impossible to render harmless. . ." a diversion box located in an urban area such as the one in the instant case.

All that would have been required in order to render such diversion box practically harmless was the installation of a metal grate over the downstream pipe so as to preclude entry into the box. With regard to such installation, one of the issues of fact that would be presented to a jury, in the absence of a summary judgment, would be whether the failure to install a metal grate over the entrance to the downstream pipe constituted negligent conduct.

It can not be too strongly emphasized that petitioner does not seek abrogation of the Salladay doctrine as originally set forth and as is still applicable to open waterways, such as the flume in Salladay or the open lateral in the instant case. However, when an unreasonably hazardous condition, such as the downstream pipe which lured petitioner and his companion to their respective "deaths," is

maintained by an irrigation system owner, in the face of knowledge that children frequently play in, or about such structures, the rationale of Salladay can not be justifably extended to provide unbridled immunity from tort liability to a negligent party.

This distinction was well recognized by Judge Cameron in his dissenting opinion in Hersey v. Salt River Valley Water Users Ass'n, supra, as follows:

> " I must dissent from the opinion in that I believe the failure to properly maintain a grate at the entrance to the underground culvert is indeed a meaningful distinction." Id. at 328, 458 P.2d at 432.

As Judge Cameron recognized, the time has come to draw a "meaningful distinction" between the Salladay doctrine, as originally conceived, and the improper application of such doctrine to the facts and circumstances as presented herein.

In other words, the time has come to draw a "meaningful distinction" between the immunity that the Arizona Supreme Court has historically given to open irrigation canals on the one hand, and the negligent design and maintenance of mechanical or electrical equipment, wiers, dams and diversion points in congested urban areas on the other hand.

Nor can it be realistically argued that the cost of acquiring suitable protection for liability arising from negligent conduct in the form of liability insurance is a factor which could be used to discourage the irrigation of the arid desert land of this state inasmuch as liability insurance is now readily available with which the irrigation districts, as do other utility type entities which serve the public, could adequately protect themselves from the consequences of any

negligence.

Assuming arguendo that the cost of such liability insurance were prohibitive, the Arizona Supreme Court itself in Salt River Valley Water Users Ass'n. v. Compton, 39 Ariz. 491, 505, 8 P.2d 249, 254 (1932), stated that:

> ". . .the mere cost of giving to another that protection to which the law says he is entitled should never be an excuse for failure to provide it."

In addition to the foregoing, the Arizona Supreme Court's interpretation and extension of the Salladay doctrine, under present day circumstances and with specific regard to the facts of the instant case, constitutes judicial legislation which is prohibited by and contrary to article 2, §13 of the Arizona Constitution which prohibits the enactment of any law granting to any citizen, class of citizens or corporation, other

than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations. By establishing such judicial immunity from tort liability for a specific class of citizens, i.e., irrigation system owners, the Arizona Supreme Court has, in fact, denied the petitioner and others similarly situated equal protection of the law in that they are confronted with a privilege or immunity which does not, upon the same terms, apply equally to all citizens or corporations.

Based upon the foregoing, petitioner respectfully submits that the judicially created special immunity for irrigation system owners is, in addition to being unreasonable, arbitrary and capricious, devoid of any real and substantial relation to the object sought to be attained and is, therefore, in violation of the pro-

tection afforded by section 1 of the Fourteenth Amendment to the United States Constitution. Nebbia v. New York, 291 U.S. 502 (1934).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Arizona.

Respectfully submitted,

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Phoenix, Arizona 85003

Andrew G. Galasky

D. Wayne Brown

Counsel for Petitioner

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PAUL LUCERO, a minor child, by his next best friend and mother, SYLVIA LUCERO, Plaintiff, vs. ROOSEVELT IRRIGATION DISTRICT, Defendant.	No. C240182 JUDGMENT (Div. 16 - Froeb)

The motion of the defendant ROOSEVELT IRRIGATION DISTRICT, for summary judgment, having come on regularly for hearing on the 6th day of October, 1971, and counsel for the parties having been present, and the pleadings and arguments of counsel having been made and considered, good cause having been shown, the matter having been under advisement.

The court finds that there is no genuine issue as to any material fact relating to the liability of the defendant and that it is, therefore, entitled to judgment as a matter of law. There being no just reason for delay.

IT IS HEREBY ORDERED that the defendant's Motion for Summary Judgment is granted and final judgment is hereby entered in favor of the defendant ROOSEVELT IRRIGATION DISTRICT, and against the plaintiff.

IT IS FURTHER ORDERED that the defendant shall recover its costs herein incurred.

DONE IN OPEN COURT this 15 day of October, 1971.

/s/ Donald F. Froeb
J U D G E

Copy of the foregoing
mailed this 15th day
of October, 1971, to:

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George H. Mitchell

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED AUG 1 1974
CLASSIE GANTT, CLERK
By /s/ Muriel S. Hume
Muriel S. Hume, Deputy

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PAUL LUCERO, a minor child, by his next best friend and mother, SYLVIA LUCERO,	1 CA-CIV 1946 DEPARTMENT A
Appellant,	MEMORANDUM DECISION
v.	[Not for publication; Rule 48, Rules of the Arizona Supreme Court]
ROOSEVELT IRRIGATION DISTRICT,	
Appellee.	

An appeal from the Superior Court

of Maricopa County

Cause No. C-240182

The Honorable Donald F. Froeb, Judge

AFFIRMED

Meadow, Nastro & Thrasher
by Stephen T. Meadow
Kenneth A. Winsberg
Attorneys for Appellant Phoenix

O'Connor, Cavanagh, Anderson,
Westover, Killingsworth & Beshears
by Lorin G. Tobler
Attorneys for Appellee Phoenix

OGG, Judge

In this appeal we must determine if, under the facts of this case, the Appellee-Defendant Roosevelt Irrigation District is entitled to negligence immunity under the doctrine of SALLADAY v. OLD DOMINION COOPER CO., 12 Ariz. 124, 100 P. 441 (1909).

This negligence action was brought by Sylvia Lucero on behalf of her thirteen year old son, Paul Lucero, for injuries he suffered in a concrete diversion or turn-out box owned and maintained by Roosevelt Irrigation District.

The trial court granted the Irrigation District's motion for summary judgment and Lucero filed this appeal.

Paul Lucero, while playing near the intersection of 24th Avenue and West Durango, Phoenix, Arizona entered an open pipe approximately thirty inches in diameter which led into a diversion box owned by the Irrigation District. Once inside the box Lucero, along with a young companion, placed boards over the only available exit to the thirty inch pipe. As the water level built up inside the box the boys were unable to remove the boards; as a result the campanion drowned and Paul Lucero suffered serious injury. Paper warning signs had been affixed to the diversion box from time to time but there was no warning sign there on the date of the accident.

Lucero makes a persuasive argument that the SALLADAY doctrine has no logical justification in modern Arizona and that the artificial structure in this case is a far different condition than the rural open canal situation that was the factual basis of the SALLADAY decision.

We have just decided the case of ELKINS v. ROOSEVELT WATER CONSERVATION DISTRICT, 22 Ariz. App. 130, 524 P.2d 964 (1974), which is directly on point. We believe the reasoning in that case has equal application here.

In our opinion the SALLADAY case and its progeny grant negligence immunity to the Irrigation District in this case. Only the Arizona Supreme Court can modify these prior decisions. McKAY v. INDUSTRIAL COMMISSION, 103 Ariz. 191, 438 P.2d 757 (1968).

The judgment of the trial court is affirmed.

/s/ Jack L. Ogg
JACK L. OGG
Judge

CONCURRING:

/s/ Francis J. Donofrio
FRANCIS J. DONOFRIO
Presiding Judge
Department A

/s/ Henry S. Stevens
HENRY S. STEVENS
Judge

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED SEP 27 1974
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By /s/ Muriel S. Hume
Muriel S. Hume, Deputy

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SEPTEMBER 27, 1974

PAUL LUCERO, a minor child, by his next best friend and mother, SYLVIA LUCERO,	1 CA-CIV 1946 DEPARTMENT A
Appellant,	MARICOPA County Superior Court
v.	No. C-240182
ROOSEVELT IRRIGATION DISTRICT,	ORDER
Appellee.	

Appellant's motion for rehearing and the appellee's objection thereto have been considered by Judges Donofrio, Ogg and Stevens.

IT IS ORDERED denying the

motion for rehearing.

/s/ Francis J. Donofrio
FRANCIS J. DONOFRIO
Presiding Judge
Department A

A true copy of the
foregoing order was
mailed this 27th day
of September, 1974, to:

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CLASSIE GANTT, Clerk

By

/s/ Muriel S. Hume
Deputy Clerk

SUPREME COURT

STATE OF ARIZONA

November 20, 1974

PAUL LUCERO, a minor child, by his next best friend and mother, SYLVIA LUCERO,	Supreme Court No. 11776-PR
Appellant,	Court of Appeals No. 1 CA-CIV 1946
v.	
ROOSEVELT IRRIGATION DISTRICT,	Maricopa County No. C-240182
Appellee.	

The following action was taken by the Supreme Court of the State of Arizona on November 19, 1974 in regard to the above-entitled cause:

"ORDERED: Petition for Review = Denied."

Justice Lorna E. Lockwood and Vice Chief Justice James Duke Cameron voting to grant.

Record returned to the Court of Appeals, Division One, this 20th day of November, 1974.

CLIFFORD H. WARD, Clerk

By /s/ Mary Ann Hopkins
Deputy Clerk

To: Meadow, Nastro & Thrasher, 416 Luhrs Building, Phoenix, AZ. 85003 ATTN: Stephen T. Meadow, Esq., and Kenneth A. Winsberg, Esq.
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Hon. Donald F. Froeb, Judge of the Superior Court, 101 West Jefferson, Phoenix, AZ. 85003
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dkb